

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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DEC 11 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the matter of

Closed Captioning and Video Description
of Video Programming

CS Docket No. 95-176

REPLY TO OPPOSITION
TO PETITION FOR RECONSIDERATION

The Association of Local Television Stations, Inc. ("ALTV"), hereby replies to the opposition to its Petition for Reconsideration of the Commission's *Report and Order* in the above-captioned proceeding, FCC 97-279 (released August 22, 1997), 62 *Fed. Reg.* 48487 (September 16, 1997)[hereinafter cited as *Report and Order*], filed by the National Association of the Deaf ("NAD") and Consumer Action Network ("CAN").¹

Current Captioning Levels: NAD/CAN offers two meritless arguments in opposing ALTV's request that the Commission eliminate the requirement that stations maintain the current level of captioning. (§79.1(b)(3)). First, they contend that "it is hard to understand why stations would not *want* to fulfill their captioning requirements by captioning shows that are most

¹Response of the National Association of the Deaf and the Consumer Action Network to Requests for Reconsideration, MM Docket No. 95-176 (filed November 26, 1997)[hereinafter cited as "NO"].

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responsive to local community demand.”² Whether stations *want to* hardly is the issue. In the case of syndicated programming, stations are in no position to add captioning to a desirable, but uncaptioned program. Consequently, local television stations easily may end up in the undesirable position of making a programming decision based on whether a program is captioned.³

Second, NAD/CAN rely on Congressional intent that the new law increase the amount of captioning.⁴ The Commission’s new rules, however, will accomplish the intended result, irrespective of the fate of the rule requiring the maintenance of current captioning levels. Over the course of the phase-in (also something clearly intended by Congress), captioning levels will increase, ultimately to near one hundred per cent.⁵ Therefore, NAD/CAN’s argument is misplaced.

Programming with repeat value. NAD/CAN’s opposition to ALTV’s proposals to clarify the exemption in §79.1 (d)(8) epitomizes overreaction. ALTV only sought to clarify that the exemption would continue to apply if an otherwise exempt program were double-run or occasionally re-run on the producing station (or LMA’d station in the same market) or broadcast on a co-owned station in another market. In no way, however, did ALTV seek to expand the exemption broadly. Indeed, it already speaks to programming with “limited repeat value.” ALTV

²NO at 11, n.8.

³NAD/CAN believes that the new rules allow “considerable flexibility for stations to introduce new shows.” However, the provision requiring maintenance of current captioning levels is, perhaps, the most inflexible provision among the new rules.

⁴NO at 11.

⁵As ALTV observed in its Petition for Reconsideration, MM Docket No. 95-176, filed October 16, 1997, at 6 [hereinafter cited as “ALTV”]:

All stations will be required to achieve the requisite bench mark levels of captioned programming. If these levels are sufficient in overall public interest terms for one station, they should be sufficient for all. If enough is enough, no reason exists to require some stations to provide more than enough.

only sought assurance of sufficient flexibility to accommodate the efforts by some local television stations to expand the reach of some public affairs programs, which normally attract only minimal audiences (regardless of how many times they are shown).⁶ Such a clarification breaks no new ground in the dimension of the exemption.

Political debates. NAD/CAN fails to address ALTV's basic argument in seeking *clarification* of the exemption in §79.1(d)(8) regarding political debates. Political debates are precisely the type of programming which §79.1(d)(8) covers -- locally-produced programming with limited repeat value.⁷ Instead, NAD/CAN says the Commission's efforts to promote local candidates' debates speak for themselves.⁸ Again, however, as ALTV argued, the Commission should not seek to encourage debates on one hand and burden them with considerable new costs on the other.⁹ Such actions work against each other.

Definition of new programming. In opposing ALTV's clarification that any program or series offered in syndication prior to January 1, 1998, will be considered pre-rule programming under §79.1(a)(6)(I), NAD/COM would have the Commission treat "publish" and

⁶Contrary to NAD/CAN's suggestion (NO at 11), viewer interest rarely is reflected in the size of the audience for such programs, no matter how important the issue to the community.

⁷As ALTV pointed out in its Petition for Reconsideration (at 8):

[T]hey are virtually no different from local talk shows in every regard pertinent to the captioning requirements. They are unremunerative public interest programming which would be very expensive to caption.

⁸NO at 11.

⁹ALTV at 8.

"exhibit" as synonymous.¹⁰ Congress, however, chose to use both words, and neither should be arbitrarily written out of the statute -- or the Commission's rules.¹¹ Moreover, ALTV, rather than NAD/CAN, has urged the "common sense" approach, one which avoids the tricky compliance problem with respect to series with episodes first exhibited both before and after January 1, 1998.¹² Finally, with respect to ALTV's proposal that exhibition or publication "by *any* distribution method" encompasses theatrical or home video release of a motion picture, the Commission has stated unambiguously that exhibition or publication "by any distribution method" satisfies the definition of pre-rule programming.¹³ ALTV's clarification, therefore, is just that -- a clarification.

Edited programming. NAD/CAN's response to ALTV's proposal to consider locally edited programming exempt is simplistic and naive. This is no matter of evading the captioning requirement under the guise of editing for taste. The difficulty which ALTV sought to address involves captioned programming, which when edited at the local station level, would require

¹⁰NAD/CAN relies on the venerable Webster's Dictionary, which defines "publish" as "to place before the public." This only begs the question of what is put before the public -- a videocassette version of *The English Patient* or the motion picture itself exhibited on the silver screen.

¹¹See *Report and Order* at ¶60.

¹²Thus, ALTV noted in its Petition for Reconsideration (at 11-12):

[I]t avoids the tricky compliance issue which would arise if a syndicated off-network program like *The Simpsons* were defined as "pre-rule" or "new" based on when each particular episode of the program actually was first broadcast. In the case of such ongoing network series, some programs would be pre-rule, while episodes first broadcast on or after January 1, 1998, would be considered "new." Several years into the future, when the program may have departed the network, but still was in syndication, stations would be faced with sorting episodes as old or new, thereby complicating their efforts to comply with the rule. Similarly, monitoring compliance would be virtually impossible. Viewers will have no means of knowing when particular episodes were first shown.

¹³*Report and Order* at ¶60.

reformatting, a burdensome undertaking at the local station level. Indeed, the Commission expressly has refused to require reformatting by video providers.¹⁴ No reason exists to place that burden on local stations, where the burden would become even more intolerable.

Barter transactions and network compensation. ALTV urged the Commission to clarify that local television stations need not include the value of network compensation or barter transactions in calculating net revenue.¹⁵ Again, NAD/CAN raises the groundless fear that stations would increase the scope of barter and network programming to avoid captioning requirements. This is absurd. Stations hardly are going to affiliate with networks, clear more network programming, or structure syndication deals simply to retain an exemption from the captioning requirements. On the other hand, they hardly can be expected to include in their revenue calculations barter revenue, which is unknown to them, or network compensation, when such revenues already have been attributed to the network for purposes of its exemption.¹⁶

Shopping and infomercial programming. NAD/CAN essentially fails to address ALTV's arguments in support of more flexible treatment for shopping and infomercial programming. As ALTV stated:

Stations with near full-time shopping or infomercial schedules, however, likely will be hard pressed to meet the bench marks. They will face the unhappy prospect of changing their programming just to comply with the bench marks. Whether they would be able to force infomercial producers to caption programming is problematic. Similarly, home shopping programming by its nature will be difficult and expensive to caption. Like local live talk shows, it is unscripted and live.

¹⁴*Report and Order* at ¶86.

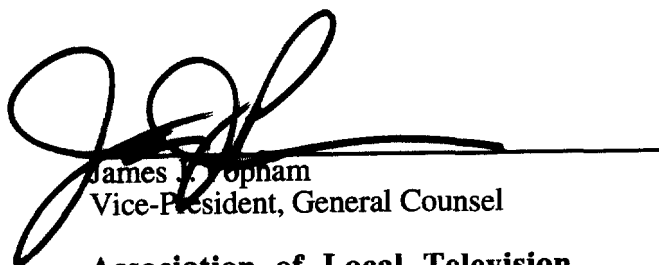
¹⁵The FCC's reference to station-controlled inventory suggests that neither should be counted, but no specific reference to either barter transactions or network compensation appears in the FCC's explanation of the new rules. *Report and Order* at ¶165.

¹⁶*See Report and Order* at ¶165.

NAD/CAN simply fails to address these concerns -- which ALTV reiterates are valid reasons to provide more flexible treatment for shopping and infomercial programming.

In view of the above, ALTV respectfully submits that NAD/CAN has offered no valid reasons for denying ALTV's requests for reconsideration.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "J. Opham", is written over a horizontal line.

James J. Opham
Vice-President, General Counsel

**Association of Local Television
Stations, Inc.**

1320 19th Street, N.W.
Suite 300
Washington, D.C. 20036
(202) 887-1970

December 11, 1997



CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing "Reply to Opposition to Petition for Reconsideration" were served on this 11th day of December, 1997, via first class mail, postage prepaid, upon the following:

Karen Peltz Straus
Legal Counsel for Telecommunications Policy
National Association of the Deaf
814 Thayer Ave.
Silver Spring, MD 20910-4500



James J. P. Pham